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No. 10-251

Supreme Court, U.S.
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In The
Supreme Court of the United States

EXPERIAN INFORMATION SOLUTIONS, INC.,

Petitioner,

v.

MARIA E. PINTOS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* CONSUMER DATA INDUSTRY ASSOCIATION AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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Pursuant to Rule 29.6, the Consumer Data Industry Association provides the following disclosure.

CDIA is a trade association. No publicly held company owns 10% or more of its stock.

The Chamber of Commerce of the United States of America is a not-for-profit corporation. No publicly held company owns 10% or more of the its stock.

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INTEREST OF *AMICI CURIAE* CONSUMER DATA INDUSTRY ASSOCIATION[1] AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

The Consumer Data Industry Association ("CDIA") and the Chamber of Commerce of the United States of America ("Chamber"), submit their brief in support of petitioner, Experian Information Solutions, Inc. (*hereinafter*, "Experian").

CDIA is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer information reporting services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies ("CRAs") in the marketplace. CDIA is the largest trade association of its kind

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[1] The parties were notified of CDIA's intention to file this brief within the time provided by Rule 37.2(a). All parties have consented to the filing of this brief and the consent letters have been filed with the Clerk of the Court with this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

in the world. Its membership includes more than 200 consumer credit and other specialized CRAs operating in the United States and throughout the world.

In its more than 100-year existence, CDIA has worked with the United States Congress and the State legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of consumer report information. In this role, CDIA participated in the legislative efforts that led to the enactment of the Fair Credit Reporting Act ("FCRA") in 1970 and its subsequent amendments. CDIA also publishes, maintains and updates a manual entitled *How to Comply with the Fair Credit Reporting Act*, which is used by CDIA's members and their clients, the users of consumer reports.

The Chamber is the world's largest not-for-profit business federation, representing 300,000 direct members and indirectly representing the interests of over 3,000,000 businesses and business associations. For almost a century, the Chamber has played a key role in advocating on behalf of its membership. An important function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

CDIA's CRA members, and the millions of statutory lien holders and other lien creditors who use consumer reports furnished by CRA, as well as

consumers who are the subjects of those consumer reports, will be harmed by the Ninth Circuit's decision which drastically narrows the scope of the permissible purpose found in the FCRA, 15 U.S.C. § 1681b(a)(3)(A).

CDIA's decades-long central role in the consumer reporting industry, participation in the process leading to the FCRA's enactment and amendments, and participation as an *amicus curiae* in the Ninth Circuit appeal, allows CDIA to aid this Court in its consideration of the important issues raised in Experian's Petition for Writ of *Certiorari*.

Many members of the Chamber, including statutory lien holders and businesses that acquire obligations secured by statutory liens, have found that consumer reports are valuable collections tools when used to identify debtor assets and to locate debtors who otherwise may not be found. For this reason, the Chamber has a strong interest in ensuring that consumer reports remain available as collections tools under the FCRA without the need for its membership to bring lawsuits against consumers to reduce to judgment amounts that are already owed by operation of law or through assignment.

Left uncorrected, the Ninth Circuit's decision will prohibit an array of legitimate creditors from obtaining consumer reports for collections purposes. In addition, the decision will result in the overburdening of the courts of every jurisdiction as creditors are forced to initiate lawsuits to reduce their claims to a judgment to meet the Ninth Circuit's newly-created

judgment creditor requirement before they will have a permissible purpose to obtain consumer reports for collections purposes.

SUMMARY OF ARGUMENT

This Court should grant Experian's petition for writ of *certiorari* and summarily reverse to give effect to the plain language of the collections permissible purpose set forth in 15 U.S.C. § 1681b(a)(3)(A) and to preserve the uniformity of decisions among the circuit courts of appeals.

Alternatively, if summary reversal is not ordered, this Court should grant Experian's petition to fully consider the merits. Left unreviewed and uncorrected, the Ninth Circuit's decision will mean that holders of statutory liens, including governmental taxing authorities, and others seeking to collect obligations that were not reduced to judgment or were not the result of a consumer affirmatively seeking credit, will be deprived of an invaluable collections tool that they have relied upon for decades to locate delinquent or defaulting debtors and identify assets that may be available to pay an outstanding obligation. The increased transaction and collections costs incurred by these creditors will, necessarily, be borne by consumers who will pay more for products, services, taxes, fines and judgments.

ARGUMENT

CDIA and the Chamber agree with, and join in, the arguments of Experian that the Ninth Circuit's decision ignores the plain language of the collections permissible purpose set forth in 15 U.S.C. § 1681b(a)(3)(A), directly conflicts with the decisions of the courts of appeals in the sixth, seventh and eighth circuits[2] and conflicts with the well-settled, twenty-year old interpretation of the Federal Trade Commission, which is charged with enforcing the FCRA.[3]

Amici provide their separate brief to explain the importance of the question presented by the Ninth Circuit's decision to the millions of consumer report users who will be deprived of a valuable collections tool by the Ninth Circuit's insupportable narrowing of the FCRA's "collection of an account" permissible purpose found in 15 U.S.C. § 1681b(a)(3)(A).

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[2] *See,* Experian's Petition for Writ of *Certiorari* at 16-17 (discussing *Duncan v. Handmaker*, 149 F.3d 424, 428 (6th Cir. 1998); *Miller v. Walpoff & Abramson, LLP*, 309 F.App'x 40, 43 (7th Cir. 2009); *Phillips v. Grendahl,* 312 F.3d 357, 366 (8th Cir. 2002)).

[3] Experian's Petition at 17-19.

THE NINTH CIRCUIT COURT OF APPEALS' DECISION PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT MUST BE ADDRESSED BY THIS COURT.

Experian's petition must be granted so that this Court may settle an important question of federal law and preserve the availability of consumer reports as a collections tool for millions of legitimate creditors, including statutory lien creditors, governmental taxing authorities, and other users of consumer reports to whom consumers become indebted without first applying for an extension of credit or being a defendant in a lawsuit.

1. The Ninth Circuit's decision is irreconcilable with the plain language of the FCRA and impermissibly narrows the scope of the collections permissible purpose.

FCRA section 1681b(a)(3)(A) permits a CRA to furnish a consumer report to a user of the report if the CRA has reason to believe that the person "intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the . . . collection of an account of . . . the consumer. . . ."[4] Twenty years ago, the FTC explained that this permissible purpose "permits . . . lien creditors to obtain

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[4] 15 U.S.C. § 1681b(a)(3)(A).

consumer reports on . . . individuals whose property is subject to a lien creditor's lien."[5]

Ignoring the plain language of the FCRA's permissible purpose provision, and the FTC's well-settled interpretation, the Ninth Circuit held that section 1681b(a)(3)(A) provides a permissible purpose for a creditor to obtain a consumer report for collections purposes *only if* the creditor reduced its claim to a judgment or the consumer was a "participant" in the credit transaction because she "initiated" the transaction or applied for credit.[6]

To reach its conclusion, which is unsupported by the language of the FCRA, contrary to its own prior decision, and in conflict with the decisions of three other federal circuit courts of appeal, the Ninth Circuit issued, withdrew, and re-issued multiple versions of its decision, amending and modifying its language along the way to remove the most obvious errors as they were identified by the petitioners when seeking a rehearing on the Ninth Circuit's decision. The dissenting judges from the Ninth Circuit's denial of the petitions for rehearing explained some of the Ninth Circuit's errors:

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[5] 16 C.F.R. Pt. 600 App., *Statement of General Policy or Interpretation; Commentary on the Fair Credit Reporting Act*, § 604(3)(E), cmt. 4 (May 4, 1990).

[6] *Pintos v. Pacific Creditors Assn., et al.*, 605 F.3d 665, 675-676 (9th Cir. 2010).

> I write separately to point out another problem with the [majority's] opinion: Its interpretation of the Fair Credit Reporting Act (FCRA) is foreclosed by the plain language of the statute.[7]

The Ninth Circuit's first iteration of its decision held that the 2003 Fair and Accurate Credit Transactions Act ("FACTA") amended the FCRA and, thereby, changed the law in the Circuit.[8] According to the Ninth Circuit, following the FACTA amendments, *lien* creditors no longer had a permissible purpose, under FCRA § 1681b(a)(3)(A), to obtain a consumer report for collections purposes.[9]

After the Ninth Circuit issued its decision, Experian filed its petition for rehearing, and CDIA filed its *amicus* brief in support of the petition, both of which explained that the circumstances giving rise to Pintos' complaint and the appeal all occurred on December 5, 2002, *fifteen months before* the relevant FACTA amendments became effective. The amendments, therefore, could not provide a basis for reevaluating the holding of *Hasbun*[10] upon which the

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[7] *Pintos v. Pacific Creditors Assn.*, 2010 U.S. App. LEXIS 10529, *4 (May 21, 2010) (dissenting opinion).

[8] *Pintos v. Pacific Creditors Assn.*, 504 F.3d 792, 799-800 (9th Cir. 2007) (withdrawn).

[9] *Id.*

[10] *Hasbun v. County of Los Angeles*, 323 F.3d 801 (9th Cir. 2003).

district court relied to hold that PCA had a permissible purpose to obtain Pintos' consumer report to collect the amount of the statutory lien. The Ninth Circuit withdrew its first decision.[11]

Moreover, even if the FACTA amendments had been effective at the time Pintos' lien obligation arose, those amendments did not modify the permissible purpose found in section 1681b(a)(3)(A) to limit its availability only to instances in which the consumer voluntarily applied for credit. A FACTA amendment defining "creditor" in a way that could have limited the availability of the permissible purpose found in section 1681b(a)(3)(A) to credit obligations *voluntarily assumed* by the consumer was, in fact, considered and rejected by the House of Representatives.[12]

The Ninth Circuit's most recent iteration of its opinion relies on statutory language the Ninth Circuit apparently overlooked in its prior decisions to now conclude that, notwithstanding the inapplicability of the FACTA amendments upon which the Ninth Circuit exclusively relied, section 1681b(a)(3)(A) provides a collections permissible purpose *only* for

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[11] *Pintos v. Pacific Creditors Assn., et al.*, 565 F.3d 1106, 1110 (9th Cir. 2009).

[12] *See*, Fair and Accurate Credit Transactions Act of 2003 § 2, H.R. 2622 (as introduced in the House) (proposing to amend the FCRA by incorporating the definition of "creditor" found in section 103 of the Truth in Lending Act, 15 U.S.C. § 1602(f), where "creditor" is defined to mean a person who "regularly extends . . . consumer credit" that is "payable by agreement.").

transactions in which the consumer initiates the credit transaction or participates in a way that demonstrates her intent to seek credit.[13] The Ninth Circuit's decision incorrectly reads the words "credit transaction" and "involve," as used in section 1681b(a)(3)(A), as a limitation on the availability of the collections permissible purpose.[14] This limitation improperly deprives an entire class of creditors of access to consumer reports for debt collections purposes.[15]

2. If not reversed, the Ninth Circuit's decision will unnecessarily burden the court system and harm millions of creditors and consumers as well as the consumer reporting agencies who provide consumer reports for collections purposes.

Unless corrected, the Ninth Circuit's decision will have devastating consequences for the holders of statutory liens, including governmental tax lien holders, and others seeking to collect obligations that were not reduced to a judgment or were not the

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[13] *Pintos*, 605 F.3d at 675; *see also*, Experian's Petition at 5-8 (discussing the Ninth Circuit's interpretation of these words).

[14] *Id.* at 675-676.

[15] The Ninth Circuit's decision also cannot be reconciled with section 1681b(c) which contemplates that the section 1681b(a)(3)(A) permissible purpose *includes* debts arising from transactions that consumers have not initiated. *See*, Experian's Petition at 11-14 for a fuller discussion of this issue.

result of a consumer affirmatively seeking credit. These creditors rely on the availability of consumer reports to quickly locate debtors, determine their ability to pay, and facilitate collection efforts. Without the ability to use consumer reports, such skip-tracing and collection will become more complicated, expensive and time-consuming. As the dissenting judges recognized, by increasing the collections burden, the Ninth Circuit's decision harms even the consumers who are the subject of lien creditors' collections efforts:

> Use of credit reports expedites collections, reducing collection costs, and *because such costs may be shifted to consumers, permitting the credit reports to be relied upon by creditors may decrease costs to citizens* who are so unfortunate as to leave their unregistered cars parked on the street and subject to towing. *If a collection agency standing in the shoes of the towing company is not allowed to request and see a credit report, then the costs of collection are going to increase, then correspondingly the costs of towing are going to increase, and finally the scope of fines for violators would likely be increased.* In my view, permitting credit reports to go to creditors, whether they have a judgment or not, will be less expensive for both debtors and creditors.[16]

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[16] *Pintos*, 2010 U.S. App. LEXIS 10529 *7-8.

Under the Ninth Circuit's decision, the burden on the judicial system will also increase as lienholders and non-traditional creditors file tens-of-thousands of otherwise unnecessary complaints in the courts of every jurisdiction to obtain judgments so that they may be considered "creditors," under the Ninth Circuit's decision and, therefore, entitled to the full panoply of collections tools, including consumer reports.

These lawsuits would, self-evidently, be a waste of limited judicial resources. The statutes giving rise to the liens already establish the existence and the amount of the obligation owed by the consumer. But the Ninth Circuit believes that a court's judgment for the same amount, under the same statute, is necessary before the required debtor-creditor relationship exists that will support the use of consumer reports under the section 1681b(a)(3)(A) permissible purpose.[17] For the court, this is apparently true even if the judgment is a default judgment and the consumer never responds to the complaint. According to the Ninth Circuit, the fact of the judgment alone transforms a statutory obligation or other debt into a "credit transaction" that "involves" the consumer and, therefore, provides a permissible purpose to obtain a

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[17] *Pintos*, 605 F.3d at 676 ("If a debt has been judicially established, there is a 'credit transaction involving the consumer' no matter how it arose. The obligation is established as a matter of law, and the statute is satisfied.").

consumer report under section 1681b(a)(3)(A).[18] The Ninth Circuit's newly-created procedural requirement – that statutory liens and other non-traditional credit obligations must be reduced to judgment to constitute a credit obligation that may be collected for purposes of section 1681b(a)(3)(A) – is found nowhere in the FCRA.

Not only will the Ninth Circuit's decision unnecessarily burden the judicial system, it will also undermine the efficacy of well-established governmental procedures. The facts of this case alone begin to illustrate the harmful consequences flowing from the Ninth Circuit's decision. The police directed P&S Towing to tow Pintos' vehicle because its registration was expired.[19] By operation of California law, the towing company:

> [H]as a lien . . . for compensation to which the person is legally entitled for towing, storage, or labor associated with recovery or load salvage of any vehicle subject to registration that has been authorized to be removed by a public agency. . . . The lien is deemed to arise on the date of possession of the vehicle.[20]

The towing company's incentive to respond to the police department's request for assistance was the

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[18] *Id.* at 675-676.

[19] *Id.* at 673.

[20] Cal. Civ. Code § 3068.1(a).

existence of the statutory lien which ensured that, even if the vehicle was never recovered by the owner, the towing company would be paid for the services it provided because it could sell the vehicle after a statutorily defined period.[21] By California law, the towing company was entitled to recover this amount *without having to file a lawsuit and obtain a judgment* against the vehicle owner.

Under the Ninth Circuit's decision, the towing company may attempt to collect the lien amount, but it is deprived of an invaluable collection tool, the vehicle owner's consumer report, unless the company first files a lawsuit and obtains a judgment against the vehicle owner.[22] Only then, according to the Ninth Circuit is the lienholder a "creditor" for FCRA purposes who can obtain a consumer report for collections purposes.[23] The Ninth Circuit justifies this result by declaring, without explanation, that the judgment gives rise to a "'credit transaction involving the consumer' . . . no matter how it [the debt] arose" and establishes the "obligation . . . as a matter of law. . . ."[24] Of course, the statute creating the lien in favor of the lienholder (the towing company in this case) also establishes the obligation by operation of law. It is difficult to understand, *and the Ninth*

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[21] Cal. Civ. Code § 3068.1(b)

[22] *Pintos*, 605 F.3d at 676.

[23] *Id.* ("a judgment creditor is authorized under the statute to obtain a credit report in connection with collection efforts.")

[24] *Id.*

Circuit does not explain, how the existence of a "credit transaction involving the consumer" turns on whether the debt has been reduced to judgment.

The impact of the Ninth Circuit's decision is not limited to the potential littering of streets with illegally parked vehicles that will not be towed. It extends to other creditors' ability to collect other consumer debts. Under the Ninth Circuit's reasoning, governmental taxing authorities may not use consumer reports to collect unpaid taxes unless a judgment is first obtained. The assignees of receivables that do not arise from consumer-initiated credit transactions may not use consumer reports to collect the amounts they are owed. These uncollected tax lien amounts and consumer debts mean reduced revenue and greater transaction costs for governments and other non-traditional creditors. These costs are ultimately borne by taxpayers and consumers who must make up the losses through increased taxes and higher prices for goods and services. The Ninth Circuit's decision will also deprive CRAs of the revenue they would otherwise earn in providing consumer reports to assist lien creditors and other non-traditional creditors in their collection efforts.

Left uncorrected, the Ninth Circuit's decision means that any service or materials provider who obtains a statutory lien must, before it provides its products or services, consider: (i) whether it will respond to a request for service giving rise to a statutory lien when its collection efforts will be hampered because no consumer report can be obtained; and (ii)

whether the amount of the statutory lien will be sufficient to cover not only the cost of the service or materials, but also the court costs and attorneys' fees for the lawsuit that will have to be filed to obtain a judgment the Ninth Circuit believes is a prerequisite to "creditor" status under section 1681b(a)(3)(A). Such considerations will, necessarily, reduce the number of businesses (*e.g.*, towing companies) offering such services to governmental agencies and will, as the dissent recognized, increase the costs ultimately paid by consumers for products, services, fines, and judgments.

CONCLUSION

To correct the Ninth Circuit's clear error and, thereby, avoid the harms to millions of businesses, governmental taxing authorities, non-traditional creditors, consumers and CRAs that will be caused by the Ninth Circuit's unwarranted narrowing of the availability of the FCRA's collections permissible purpose, Experian's petition for writ of *certiorari* must be granted and the Ninth Circuit's decision

summarily reversed or, in the alternative, set for full consideration on the merits.

Respectfully submitted,

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